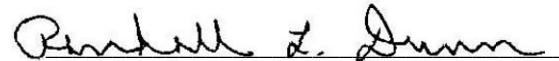


Below is an Opinion of the Court.



RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:)
Fountain Village Development,) Bankruptcy Case
) No. 09-39718-rlld11
)
 Debtor.)
-----)
Fountain Village Development,)
) Adv. Proc. No. 10-03018-rlld
 Plaintiff,)
)
 v.) MEMORANDUM OPINION
Weiner Investment Co. and)
Clear Channel Outdoor, Inc.,)
)
 Defendants.)
-----)

On March 30 and 31, 2011, I received evidence and heard testimony and argument at the trial ("Trial") on the amended complaint of Fountain Village Development ("Debtor"), seeking declaratory relief and damages for trespass against Weiner Investment Co. ("Weiner") and Clear Channel Outdoor, Inc. ("Clear Channel"), and on Weiner's counterclaims, also for declaratory relief and damages for trespass, against Debtor. I

1 further toured the subject real properties in the presence of the parties
2 and their counsel the following morning, April 1, 2011. At the
3 conclusion of the Trial, I took the matter under advisement.

4 In deciding this matter, I have considered carefully the
5 testimony presented and the exhibits admitted at the Trial, and the
6 parties' arguments, presented both in legal memoranda and orally at the
7 Trial. I also have reviewed relevant legal authorities, both as
8 presented by the parties and as found in my own research.

9 In light of that consideration and review, this Memorandum
10 Opinion sets forth the court's findings of fact and conclusions of law
11 under Federal Rule of Civil Procedure 52(a), applicable in this Adversary
12 Proceeding under Federal Rule of Bankruptcy Procedure 7052.

13 Background

14 I am asked by the parties to this dispute to determine who has
15 rights to a revenue stream generated by advertising on a 4-story wall
16 ("Wall") in downtown Portland. The Wall has been in existence for more
17 than a century. Weiner and its predecessors have leased the Wall for
18 advertising purposes to various third parties since 1952. No one
19 questioned Weiner's right to do so until 2007, when Debtor acquired the
20 building the Wall adjoins and to which the Wall is attached.

21 The dispute involves two parcels of real property in the block
22 between SW 2nd and SW 3d Avenues in Portland, each bordered by SW
23 Washington Street on the north. The eastern parcel, owned by Weiner, is
24 known as Lots 1 and 2, Block 19. I will refer to it as the Weiner Lot.
25 Except for the Wall and a freestanding billboard, both of which Weiner
26 leases to Clear Channel as advertising space, the Weiner Lot is operated

1 as a surface parking lot under an independent lease. The western parcel,
2 known as Lots 7 and 8, Block 19, is owned by Debtor. Lots 7 and 8 are
3 developed with a 4-story building constructed around 1900. I will refer
4 to Lots 7 and 8 as the Postal Building or the Postal Building Lot.

5 In 1885, the Portland Savings Bank building occupied a
6 substantial portion of the Weiner Lot. In 1888, Portland Savings Bank
7 built an addition to the existing structure, which encompassed the
8 remainder of the Weiner Lot, and which is referred to as the Kraemer
9 Building. The western wall of the Kraemer Building terminated just over
10 the property line of the Postal Building Lot, which at the time was not
11 developed. The historical record evidences that the western wall of the
12 Kraemer Building was subject to a "party wall" agreement dated July 26,
13 1888, between Portland Savings Bank and the owner of the Postal Building
14 Lot, who at that time was Henry Failing. See Exhibits 16, 17 and 18.
15 The party wall agreement was never recorded and was lost sometime prior
16 to September 7, 1900.

17 However, evidence both of its existence and of its terms is
18 documented in a declaration executed September 7, 1900 by the receiver
19 ("Receiver") for the Portland Savings Bank. The declaration also served
20 as the Receiver's petition to the Multnomah County Circuit Court to sell
21 to Henry Failing's heirs "half of the said party wall up to and including
22 four stories thereof" for the "reasonable value" of half of the basement
23 and four stories of the Wall, which was stated to be \$1,520. The
24 petition also reflects that the Failing heirs were "about to construct a
25 four-story and basement building upon the property adjoining the said
26 Portland Savings Bank, and intends [sic] using the party wall aforesaid."

1 The petition was approved by an order of the court dated September 15,
2 1900. The Receiver's acknowledgment of receipt of payment of the \$1,520
3 from the Failing heirs was recorded March 2, 1927, the same date on which
4 the Failing heirs sold the Postal Building Lot, improved with the Postal
5 Building, to the Alderpark Holding Company. The recorded transfer to
6 the Alderpark Holding Company states that the Postal Building Lot was
7 "free from all incumbrances save and except . . . the party wall
8 agreement affecting Lots One and Two in Block 19 . . ." Surveys of the
9 Weiner Lot conducted in 1919 and 1925 both reference the Wall as a party
10 wall. See Exhibits 4 and 5. A survey prepared by Chase, Jones &
11 Associates, Inc. on March 24, 2010 ("2010 Survey"), sets forth all points
12 at which the Wall encroaches upon the Weiner Lot. See Exhibit 10.

13 On September 28, 1951, Fred H. Reimers, then the owner of the
14 Weiner Lot, obtained a permit from the City of Portland ("City") to
15 demolish the Kraemer Building.¹ See Exhibit 13. As relevant to this
16 dispute, the City's Report of Inspection states: "The west wall is a
17 party wall with the 4-story Class VI Postal Bldg. @ corner of SW 3d &
18 Washington . . . There was doubt as to whether [the party wall was]
19 properly tied into above [building]." The City refused to permit
20 demolition of the Kraemer Building more than one story below the top of
21 the Postal Building unless the Postal Building was properly tied into the
22 Wall. A separate permit was issued December 11, 1951, for the purpose of
23 tying beams of the Postal Building to the Wall on its east side because
24 the Kraemer building was being demolished, which would leave no proper

25
26 ¹ The Portland Savings Bank building had been removed at some
previous date.

1 wall ties. See Exhibit 14. The Postal Building was tied to the Wall,
2 and demolition of the Kraemer Building was completed not later than
3 January 31, 1952.

4 On January 10, 1952, Mr. Reimers and his wife leased the now
5 bare Weiner Lot for a five-year term to third parties, who were to use
6 the property to construct and operate a surface parking lot. The parking
7 lot lease expressly excluded "that part of the premises occupied by party
8 walls serving [the Postal Building]." See Exhibit 21. On March 7, 1952,
9 the Reimers leased to another third party "the East and exterior face of
10 the West wall of the former Kraemer Building, located on Lots 1 and 2,
11 Block 19, Portland . . ." for a ten-year term, "for the purpose of
12 painting thereon or attaching thereto, and maintaining advertising signs,
13 including necessary structures, devices, illumination and connections."
14 See Exhibit 22. Clear Channel is the current lessee of the Wall for
15 advertising purposes.

16 In 1955, Ben and Bertha Weiner purchased the Weiner Lot
17 together with assignment of the existing leases. See Exhibits 20 and 23.
18 The Weiners transferred their interest in the Weiner Lot to Weiner on
19 April 1, 1960, which has owned it from that point forward. See Exhibit
20 24.

21 As noted above, the Wall has been used for advertising since
22 1952. For nearly half a century, all advertising on the Wall has been
23 subject to recognized rights held by Weiner, including, on occasion,
24 advertising for tenants of the Postal Building. For example, Exhibit 26
25 reflects that in 1992, Weiner leased ("Gallery Lease") a "10 feet high by
26 20 feet long" space on the Wall to The Vault Gallerie, which was at the

1 time a tenant of the Postal Building, for a three-year term, in exchange
2 for delivery to Weiner of two "serigraphs . . . along with papers of
3 authenticity," which would "represent [The Vault Gallerie's] entire rent
4 for the initial three-year period in full." The Gallery Lease provided
5 that a five-year extension would follow the initial three-year term, with
6 the monthly rent to be \$135 for the first year of the extended lease
7 term, increasing annually until the monthly rent reached \$200 for the
8 fourth and fifth years of the extended lease term. The Gallery Lease
9 stated, "It is understood that said display may only advertise The Vault
10 Gallerie, and is done as a 'neighbor courtesy' to [The Vault Gallerie's
11 owner] from [Weiner]."

12 In 1984, Postal Building Associates, Inc., then the owner of
13 the Postal Building, requested permission from Weiner to open portions of
14 the Wall for the addition of windows as part of an extensive renovation
15 of the Postal Building. Postal Building Associates, Inc. proposed to pay
16 Weiner \$1,000 immediately, "plus \$500 for each year the openings are in
17 place," and further agreed to close the openings if Weiner was to build
18 on the Weiner Lot and needed use of the Wall. See Exhibit 33. Weiner
19 rejected the proposed lease of property rights because "the stipend
20 proposed" was too minimal. See Exhibit 34. In 1987, Postal Building
21 Associates, Inc. again contacted Weiner, this time seeking approval for
22 Postal Building Associates, Inc. to paint the Wall at its own expense in
23 order to "brighten up" the Wall to complete the general face lift that
24 had been given to the Postal Building. See Exhibit 55.

25 Debtor acquired the Postal Building through a Bargain and Sale
26 Deed recorded November 1, 2007. Almost immediately Debtor demanded a

1 share in the revenues that were being generated by advertising on the
2 Wall. As early as December 12, 2007, Weiner sent a letter ("December
3 2007 Letter") to John Beardsley, who owns fifty percent of the Debtor,
4 the purpose of which was to "go on the record" regarding the Wall and the
5 respective rights of the Weiner Lot and the Postal Building Lot in and to
6 the Wall. See Exhibit HH. The December 2007 Letter was precipitated by
7 Weiner having learned that Mr. Beardsley recently had "paid a personal
8 visit and spoke with" Clear Channel's Real Estate Manager, Dan Dhruva,
9 regarding the right to use the Wall for advertising purposes. In the
10 December 2007 Letter, Mr. Weiner emphatically advised Mr. Beardsley that
11 the Debtor had no rights to any revenue generated by advertising on the
12 Wall.

13 Making sure that you know, the wall to which [Weiner] has
14 exclusively leased space to [Clear Channel] (and their
15 predecessors for the past fifty years), is a completely
16 separate concrete party wall and you do not have any rights to
the Weiner side of the wall. That wall is a party wall . . .
No owner of the Postal Building has ever received one cent of
revenue from our own side of the party wall. (Emphasis in
original.)

17
18 At trial, Mr. Weiner testified that he had no response
19 to the December 2007 Letter until Weiner was served with the
20 complaint in this adversary proceeding, which was filed January 25,
21 2010. Tr. of March 30, 2011 Trial at 180:12-25. However, as
22 evidenced by an e-mail communication to an unrelated third party
23 dated February 6, 2008, Mr. Beardsley continued in his efforts to
24 secure advertising revenue with respect to the Wall by soliciting
25 the interest of current advertisers in working directly with him
26 rather than through Clear Channel.

1 Clear Channel has been advised by the owner of the
2 parking lot that houses the free standing sign that he
3 also owns a remainder party wall that sits abutting the
4 Postal Building's east wall. That assertion is incorrect
5 because the City of Portland's records indicate that the
6 wall was demolished in the early '50s down to at least
7 the ground floor level. A physical inspection of the
8 remainder wall demonstrates that the remainder wall might
9 exist on the Northernmost part of the lot, but it doesn't
10 exist at the Southernmost, mid-block, part of the lot.
11 Therefore, the lot's owner has been charging Clear
12 Channel for wall space that he doesn't own, and Clear
13 Channel has been charging its customers for display space
14 that they have no right to.

I am about to commence legal action against the property
owner and Clear Channel which will result in the removal
of the panel signs from the Postal Building.

....
I am not happy with Clear Channel's response to my
inquiries to date so I am not motivated to enter into any
further relationship with them after the legal action is
concluded.

See Exhibit 38.

In the Amended Complaint, Debtor alleges that Weiner and
Clear Channel have trespassed and continue to trespass on Debtor's
property by anchoring or bolting stretched fabric billboard signs
directly into the Postal Building's easterly wall. Based on this
alleged trespass, Debtor asserts entitlement to (1) recovery of
rent that has been paid by Clear Channel to Weiner for use of the
Wall, (2) recovery of damages for attachment of the billboard signs
to the Wall, (3) prejudgment interest on the foregoing amounts, and
(4) an injunction against Weiner and Clear Channel's "continuing
trespass." In addition, Debtor requests a judgment declaring that
it is the owner of the Postal Building's easterly wall and that any
party wall agreement encumbering the Postal Building terminated

1 when the Kraemer Building was demolished.

2 Through its counterclaims, Weiner seeks a declaration that
3 it is the owner of the portion of the Wall that encroaches upon the
4 Weiner Lot, based either upon its rights in the Wall as a party
5 wall, or based upon a prescriptive easement. If ownership of the
6 Wall is determined to be vested in the Debtor, Weiner seeks damages
7 for trespass based upon the continuing encroachment of the Postal
8 Building on the Weiner Lot. Independent of the determination of
9 who owns the Wall, Weiner seeks damages against Debtor based on the
10 alleged intrusion into the air space of the Weiner Lot of certain
11 electrical equipment attached to the Wall, which services the
12 Postal Building.

Discussion

I. Requests for Declaratory Relief

15 Whether either Debtor or Weiner can assert a claim for
16 trespass requires first that I determine the parties' property
17 rights with respect to the Wall. Accordingly, I address first
18 Debtor's contention that it owns the Postal Building's easterly
19 wall and that any previously-existing party wall agreement
20 terminated when the Kraemer Building was demolished.

A. The Wall is a Party Wall

A party wall may be defined generally as a wall located upon or at the division line between adjoining landowners and used or intended to be used by both in the construction or maintenance of improvements of their respective tracts, or more briefly, as a dividing wall for the common benefit and convenience of the tenements which it separates.

Sobien v. Mullin, 783 A.2d 795, 798 (Pa. Super. Ct. 2001) quoting

1 40 Am. Jr. Party Walls § 2 at 485 (1942). Under the foregoing
2 definition, the Wall is a party wall.

3 Very often in the construction of such a party-wall,
4 one of the landowners is perfectly willing to have
5 the wall constructed partly upon his land, but
6 because he is not desirous of improving his lot at
7 the time objects to the payment of one-half of the
8 cost at that date. In such cases there is usually an
9 express agreement entered into under which one
landowner, called the builder, is authorized to
construct the party-wall partly on the lot of the
other, the non-builder, at the former's expense, but
the non-builder covenants to pay one-half of the cost
or value of such wall when he elects to use the wall
for support of a building.

10 2 American Law of Property: A Treatise on the Law of Property in
11 the United States § 9.21 (Little, Brown and Co. 1952).

12 It appears from the historical record that this is exactly
13 the circumstance with respect to the creation of the Wall and of
14 rights related to the Wall.

15 We know that the owner of the Weiner Lot was the "builder"
16 of the Wall. Because half of the Wall was constructed on the
17 Postal Building Lot, we can presume that at the time the Wall was
18 constructed, Mr. Failing, the owner of the Postal Building Lot was
19 "perfectly willing" to have the Wall built partly on his land.
20 "Evidence" as to the existence of a party wall agreement, and to
21 its terms, is contained in the declaration of the Receiver. We can
22 infer from the Receiver's declaration that at the time the party
23 wall was built, Mr. Failing did not want to pay one-half of the
24 cost. Thus, when his heirs wanted to construct the Postal
25 Building, they first had to acquire the rights to do so. This they
26 did by their payment of \$1,520, presumably one-half of the cost of

1 construction of the Wall, to the Receiver pursuant to the party
2 wall agreement.

3 Debtor attempted to refute that the Wall was a party wall
4 through the testimony of a structural engineer, Blake Patsy.

5 Mr. Patsy testified that in his opinion, the existing Wall at all
6 times was the separate easterly wall of the Postal Building. He
7 based this opinion on his inspection by drilling into the Wall at
8 several places, which established to his satisfaction that the Wall
9 was "one contiguous wall." On cross-examination, Weiner's
10 consulting engineer, Kevin McCormick, admitted that at least some
11 part of the Postal Building's wall was built when the Postal
12 Building was constructed in 1900.

13 Mr. Patsy also opined that there had been a separate wall
14 that had been the westerly wall of the Kraemer Building, but that
15 wall had been demolished in the 1950s. He based his opinion on the
16 inspection reports, which talk about "demoing" [demolishing] the
17 walls of the Kraemer Building, his knowledge of common thicknesses
18 for walls of buildings "of that type" around Portland, and on his
19 experience with other buildings of similar type.

20 While I find Mr. Patsy's factual testimony with respect to
21 the wall structure persuasive, i.e., that it is a single wall, I am
22 unable to accept his conclusions that the Wall at all times was
23 independent of the Kraemer Building. These conclusions amount to
24 speculation, and are based, in my view, on a faulty interpretation
25 of the historical record. First, immediately prior to the
26 construction of the Postal Building, the Failing heirs paid for and

1 acquired rights in the Wall. Second, I find nothing in the City of
2 Portland permits issued during the demolition of the Kraemer
3 Building to suggest that a separate wall was entirely demolished
4 when the Kraemer Building was taken down. To the contrary, the
5 inspection report states that "the west wall [of the Kraemer
6 Building] is a party wall with the . . . Postal Building."

7 The record does not support Debtor's contention that any
8 party wall that existed did not survive the demolition of the
9 Kraemer Building. That the Wall continues in existence is
10 evidenced by the City of Portland permits issued at the time the
11 Kraemer Building was demolished, and by the 2010 Survey documenting
12 the Wall's encroachment on the Weiner Lot.

13 As reflected in the City of Portland records, demolition
14 of the Kraemer Building was conditioned upon the Postal Building
15 first being tied to the Wall. As Debtor points out in its trial
16 memorandum, "[t]he steel brackets used in that task remain visible
17 on the exterior of the Postal Building today." Plaintiff's Trial
18 Memorandum at 3:23-24.

19 Debtor dismisses the importance of the 2010 Survey by
20 arguing only that "it is well known that there was and is a great
21 deal of encroachment among historic buildings in downtown
22 Portland." Id. at 5:11-12. This statement omits any critical
23 analysis as to why such encroachments might have been common. The
24 fact that a party wall agreement was entered into between Portland
25 Savings Bank and Mr. Failing at the time the Wall was constructed
26 clearly suggests the intent of the parties at that time that the

1 Wall encroach as a benefit to each lot. The creation of the Wall
2 as a party wall in the first instance excludes the possibility that
3 any encroachment was accidental or happenstance. The fact that
4 City of Portland ordinances around the turn of the century defined
5 and referred to party walls further suggests they were created
6 intentionally. See, e.g., The General Ordinances of the City of
7 Portland, Oregon (In Force January 2d, 1905), Ordinance 14109,
8 Section 3 ("'Party Wall' means a wall that separates two or more
9 buildings, and is used or is to be used jointly by said
10 buildings.").

11 The Wall was a party wall at the time it was created. The
12 Weiner Lot did not lose its rights in and to the Wall after the
13 Kraemer Building was demolished.

14 B. Debtor Has Only An Easement of Support in the Wall

15 Having concluded that the Wall is a party wall and that
16 both landowners shared equally in the cost of constructing the
17 Wall, we now turn to what rights each landowner holds in the Wall.

18 Party wall rights are created by statute, contract or
19 prescription. Sobien v. Mullin, 783 A.2d at 798. No Oregon
20 statute provides for the creation of party walls. Thus, any rights
21 Weiner and Debtor have with respect to the Wall arise from contract
22 or prescription.

23 Where a party-wall is constructed by agreement
24 between two adjoining landowners so that part of the
25 wall rests upon the land of each, the English courts
hold that the wall is owned by the two landowners not
in severalty but in tenancy in common. But in the
United States the courts uniformly hold that each
landowner owns in severalty that portion of the wall

1 resting upon his lot with an easement for support in
2 the other owner's portion of the wall. Thus, there
3 exists separate ownership by each landowner of a
portion of the wall with a mutual cross easement for
support appurtenant to the lot of each.

4 2 American Law of Property § 9.21.

5 The "American" view was adopted by the Oregon Supreme
6 Court in 1893.

7 A party wall is a wall built partly on the land of
8 another for the common benefit of both. The
adjoining owners are not joint owners, or tenants in
common, of the party wall. "Each is possessed in
9 severalty of his own soil up to the dividing line,
and of that portion of the wall which rests upon it;
but the soil of each, with the wall belonging to him,
is burdened with an easement or servitude in favor of
11 the other to the end that it may afford a support to
the wall and buildings of such other."

12
13 Odd Fellows Ass'n v. Hegele, 32 P.2d 679 (Or. 1893)(citation
14 omitted).

15 The only evidence in the record relating to the party wall
agreement is that it existed and that the Debtor acquired rights in
16 the Wall as a party wall. Thus, Debtor has established only that
17 it (1) owns the portion of the Wall which is on its property, and
18 (2) holds an easement for support in the entire Wall.
19

20 Debtor has no right to the revenue from the advertising
leases through a claim of ownership in the portion of the Wall
21 which is on the Weiner Lot, i.e., the Wall surface which is leased
22 for advertising purposes. Nor is there evidence that Debtor holds
23 any easement which creates a right to that revenue.
24

25 First, there is nothing in the record to establish that
26 the party wall agreement created an easement in favor of the Postal

1 Building Lot other than one limited to the support of the Postal
2 Building generally provided by the existence of a party wall. The
3 Debtor has not been restricted from this use as reflected in the
4 inspection and permit records created at the time the Kraemer
5 Building on the Weiner Lot was demolished.

6 Second, under Oregon law, one "essential qualit[y]" of an
7 easement is that it "confer[s] no right to a participation in the
8 profits arising from such property." Monese v. Struve, 62 P.2d
9 822, 825 (Or. 1936). In the absence of an express grant of a
10 property interest in the advertising revenue, no such right exists.
11 Debtor has not provided any evidence that it holds such an
12 interest.

13 As an alternative to its arguments that Debtor owns or has
14 acquired rights to the advertising revenue, Debtor asserts that the
15 Weiner Lot lost any rights in and to the Wall when the Kraemer
16 Building was demolished and Weiner stopped using the easement of
17 support in the Wall. As clarified by the Oregon Supreme Court,
18 however, the easement of support is lost only when a party wall
19 becomes unfit and unsuitable for use. Odd Fellows Ass'n, 32 P.2d
20 at 679. Although the Weiner Lot currently does not use the Wall
21 for support, it retains that right. In addition, as the owner "in
22 severalty" of the portion of the Wall on the Weiner Lot, Weiner is
23 free to make any legal use of the Wall it wishes. That the City of
24 Portland has issued permits for advertising on the Wall establishes
25 that advertising is a legal use of the Wall.

26 ///

1 C. Easement By Prescription

2 A prescriptive use is acquired if the use has existed
3 uninterruptedly for fifteen years, under a claim of
4 right, and has been open, visible and
5 continuous . . . The burden of proof is on the person
 claiming the prescriptive easement and there must be
 a fair preponderance of the evidence that the use was
 adverse.

6 WAD Realty, Inc. v. LiCamele, 472 A.2d 352, 353-43 (Conn. App.
7 1984)(citations omitted). However, where a wall straddles two
8 properties, there is no need to establish an easement in the wall
9 by prescription. Gimbel Bros., Inc. v. Markette Corp., 307 F.2d
10 91, 96 n.1 (3d Cir. 1962).

11 The Wall straddles the Weiner Lot and the Postal Building
12 Lot. Because it is on Weiner's Lot, Weiner owns the face of the
13 Wall. Thus, Weiner does not need to establish the existence of an
14 easement in the Wall for advertising purposes.

15 Even if the Wall's character as a party wall was not
16 sufficient to vest the right to the advertising revenue in Weiner
17 as a matter of law, the evidence establishes beyond question that
18 Weiner would be entitled to an easement in the advertising revenue
19 by prescription. Under Oregon law, the period of use required to
20 establish a prescriptive easement is ten years. Motes v.
21 Pacificorp, 217 P.3d 1072 (Or. App. 2009). The owner of the Weiner
22 Lot has used the Wall for advertising for nearly fifty years. That
23 use has been under a claim of right, and has been open, visible and
24 continuous. At least one prior owner of the Postal Building
25 recognized Weiner's use as under a claim of right as early as 1984,
26 twenty-three years before Debtor challenged such use in 2007.

1 II. Trespass

2 Debtor asserts that the elements of trespass are "well
3 known and straightforward." All that is required to establish
4 trespass is proof of an "intentional invasion of a possessor's
5 interest in the exclusive possession of land." Hager v. Tire
6 Recyclers, Inc., 136 Or. App. 439, 445 (1995). Further, "[a]ny
7 physical intrusion by a person onto another's land necessarily
8 interferes with the possessor's right to exclusive use of the
9 land." Halperin v. Pitts, 250 P.3d 402, 404 (Or. App. 2011)
10 (Emphasis added).

11 A. Debtor's Trespass Claims

12 Debtor asserts that Weiner's mere use of the Wall for
13 advertising constitutes a trespass because that use interfered with
14 Debtor's rights as the owner of the Wall to generate revenue from
15 its own use of the Wall for advertising. Debtor asserts that the
16 measure of damages for the trespass should be the advertising
17 revenues that Weiner has wrongfully generated from its trespass.
18 As noted above, however, Weiner is the owner of the portion of the
19 Wall subject to the leases to Clear Channel for advertising.
20 Debtor holds an easement of support in the Wall. Thus, Debtor does
21 not hold the "exclusive right to use" the Wall necessary to
22 establish a claim for relief for trespass. In any event, no
23 evidence was presented that Weiner ever trespassed on the Debtor's
24 portion of the Wall.

25 Debtor also asserts it is entitled to recover damages
26 based upon the "anchoring or bolting the stretched fabric billboard

1 signs directly into the Postal Building's easterly wall." This
2 presents a more difficult issue. The evidence establishes that a
3 portion of the Wall in fact has been damaged by Clear Channel's
4 attachment of a bolted anchoring plate to an upper corner of the
5 Wall.

6 Debtor asserts that Weiner and Clear Channel have
7 trespassed, and continue to trespass, on Debtor's property "by
8 anchoring or bolting the stretched fabric billboard signs directly
9 into the Postal Building's easterly wall." Because its rights in
10 the Wall are limited to an easement for support, Debtor can
11 establish a claim for relief for trespass only to the extent that
12 Weiner and/or Clear Channel's actions in connection with the Wall
13 have interfered with that right of support.

14 The evidence at trial establishes that Clear Channel
15 damaged the brick and mortar of the Wall where it installed
16 eyebolts that proved insufficient to support the weight of a new
17 "mesh" advertising system installed in January 2009. See Testimony
18 of Zachary Jones. To install the bolts, Mr. Jones drilled holes
19 into the brick to a depth of at least 3-1/2 inches, which were then
20 filled with solid epoxy and the bolts inserted to hold a plate in
21 place. Cable is then run through the eyebolts and attached to the
22 mesh advertising.

23 Damage to the structural integrity of the wall implicates
24 Debtor's easement of support in the Wall. Accordingly, Debtor is
25 entitled to damages, in an amount sufficient to repair the Wall,
26 based upon Clear Channel's trespass, i.e., its interference with

1 Debtor's right to its easement of support.

2 The amount of those damages is problematic. The Debtor
3 and Clear Channel each obtained bids for repair work to the Wall.
4 The Debtor's witness, Dan Ward of Willamette Painting Co.,
5 testified in support of his repair bid of \$22,640. Mr. Ward
6 testified from approximately 40 years' experience as a painting
7 contractor, specializing in repair and restoration work on older
8 buildings, primarily in the Portland downtown core area. His bid
9 specified that an area of 12' by 12' at the upper left corner of
10 the Wall would need to be "opened up, tuck pointed, sealed, acid
11 cleaned, re-plastered and painted" to complete repairs. See Exhibit
12 FF. He testified that he would not know exactly how much area of
13 the Wall would need to be repaired until bricks and deteriorating
14 mortar were removed, which had not been done, and the work required
15 would involve more masonry repair than painting. On cross-
16 examination, Mr. Ward admitted that Willamette Painting Co. was not
17 a licensed contractor, with its license having been
18 revoked/suspended in 2005 for not paying unemployment
19 taxes/unemployment insurance. He further admitted that Willamette
20 Painting Co. had been fined twice for unlicensed work in 2010.

21 Clear Channel's witness, Jeff Maiden of Duff Maiden Mason
22 Contractor, Inc. ("Duff Maiden"), testified in support of his
23 repair bid of \$3,650, based on his 38 years' experience "laying
24 brick." His bid contemplated removing a portion of the sheet metal
25 cap at the top of the Wall and removing and repairing bricks and
26 mortar from an approximate 2' by 2' area of the Wall. See Exhibit

1 101. He added \$700 for metal work on the sheet metal cap that was
2 not provided for in his bid, for a total repair bid of \$4,350. Mr.
3 Maiden admitted on cross-examination that he had no idea what he
4 would find when bricks were removed from the upper left corner of
5 the Wall. The deteriorating mortar was "almost like sand," and the
6 problem becomes once you open up an area of bricks in the wall of
7 an old building for repairs, "where do you stop."

8 Both of the parties' contractor witnesses had substantial
9 experience dealing with masonry repairs on older buildings in
10 Portland. However, Mr. Ward's testimony was undercut by his
11 business's status as "licensed challenged." Both contractors also
12 testified from a handicap in that the full extent of needed repairs
13 would not be evident until bricks were removed and the damaged
14 portion of the Wall actually was opened up. In these
15 circumstances, I find that Willamette Painting Co.'s repair bid of
16 \$22,640 is too high for the work that likely is going to be
17 required on the Wall, but Duff Maiden's repair bid is too low. In
18 these circumstances, I find that a reasonable bid/cost for the
19 required repairs to the Wall is \$8,000, and the Debtor is entitled
20 to damages in that amount for Clear Channel's trespass.

21 B. Weiner's Trespass Claims

22 Weiner seeks damages for trespass based upon the
23 continuing encroachment of the Postal Building on the Weiner Lot.
24 Because I have determined that the Wall is a party wall, and that
25 Weiner owns that portion of the Wall that is on the Weiner Lot, as
26 a matter of law Weiner has no claim for relief for trespass against

1 || Debtor to the extent that the Wall encroaches on the Weiner Lot.

Weiner also seeks damages against Debtor based on the intrusion on the Wall and into the air space of the Weiner Lot of certain electrical equipment attached to the Wall which services the Postal Building. Weiner complains that the Debtor "maintains electrical panels, meters, and conduits" ("electrical equipment") on the Weiner Lot and "in the air space of the Weiner Property." Based on the evidence presented at the Trial, it is not entirely clear what Weiner is complaining about, although the Debtor clearly has installed an electrical meter serving the Postal Building on the east side of the Wall. However, Weiner submitted no evidence of damages resulting from the alleged trespass and accordingly has not met its burden of proof to prevail on its trespass claim. I conclude that Weiner has not proved its entitlement to an injunction requiring the Debtor to remove the electrical equipment from the Wall.

Conclusion

18 Based on the foregoing findings, I conclude that Weiner is
19 entitled to judgment on both claims stated in the Debtor's amended
20 complaint, but the Debtor is entitled to a judgment on its trespass
21 claim against Clear Channel in the amount of \$8,000 damages. I
22 further conclude that Weiner is not entitled to a declaratory
23 judgment on its First Counterclaim, except to the extent consistent
24 with the findings and conclusions stated in this Memorandum
25 Opinion; Weiner's Second Counterclaim should be dismissed as moot;
26 and the Debtor is entitled to judgment on Weiner's Third and Fourth

1 Counterclaims. Mr. Groce should prepare and submit a judgment
2 consistent with this Memorandum Opinion, approved as to form by
3 counsel for the Debtor and Clear Channel, within ten days following
4 its entry.

5 ####

6 cc: Edwin C. Perry
7 Barry L. Groce
7 Craig G. Russillo

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26